December 13, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: City of Alexandria

Date of Filing: July 25, 2006

Case Number: TFA-0171

On July 25, 2006, Schnader Harrison Segal & Lewis LLP (Schnader) filed an Appeal on behalf of its client the City of Alexandria (Alexandria) from a determination issued to it by the Department of Energy's FOIA/Privacy Act Group (DOE/HQ). In that determination, DOE/HQ released some documents in response to a request for information that Schnader filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

In August 2005, the Mirant Corporation conducted tests of the emissions of the Potomac River Generating Station (PRGS) in Alexandria, Virginia and found that the plant emissions exceeded the National Ambient Air Quality Standards of the Clean Air Act. The plant's owners ceased operations. The District of Columbia Public Service Commission then filed a petition for an emergency order asserting that the plant closure reduced the reliability of the electricity supply to the metropolitan Washington, D.C. area. In December 2005, the Secretary of Energy issued an emergency order directing that plant operations resume on a restricted basis.

On March 2, 2006, Schnader sent a FOIA request to the Council on Environmental Quality (CEQ) for copies of documents in the possession of the CEQ relating to the DOE proceeding that ordered PRGS to resume operations. *See* Letter from Schnader to CEQ (March 2, 2006) (Request). Schnader also requested documents relating to CEQ consultations with other government agencies, documents pertaining to all instances between 2003 and 2006 that CEQ has invoked the provision for alternative arrangements because of a declared emergency, documents relating to guidelines for implementation

of alternative arrangements, and documents relating to guidelines for determining and evaluating emergency situations.[1] Request at 1-2. On April 4, 2006, the CEQ sent an initial response consisting of 33 documents released in their entirety and 10 released with redactions. Of the 10 redacted documents, five had originated in or were of special interest to DOE. CEQ sent those five documents, along with 14 additional responsive documents, to DOE for a final determination. DOE/HQ forwarded the request to the Office of Environment, Safety and Health (DOE/EH).[2] After consulting with the Office of the General Counsel, DOE/EH returned the responsive material to DOE/HQ for release to Schnader. On June 21, 2006, DOE/HQ sent its final response to Schnader. Letter from DOE/HQ to Schnader (June 21, 2006) (Determination). Eight of the documents were redacted and 12 were withheld in their entirety under the executive or deliberative process privilege of Exemption 5. [3]

On July 25, 2006, Schnader filed this Appeal. As an initial matter, Schnader contends that DOE applied Exemption 5 to the documents in error. Schnader argues that because all of the redacted documents (and possibly all of the withheld documents) were dated after December 20, 2005, they are "post-decisional" and Exemption 5 does not apply.[4] However if, in the alternative, Exemption 5 does apply, Schnader submits that DOE has not provided a sufficient description of the responsive material to allow Schnader to determine why the items were withheld, thus violating the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (1973) (stating that an agency must identify the withheld documents with enough detail to justify its determination to withhold). Schnader also contends that there is a public interest in the material that justifies its release to the public. The public, Schnader insists, has a vital interest in knowing the basis for the Emergency Order and in understanding the reasons for the measures taken to implement the Order. Finally, Schnader alleges that DOE did not adequately determine the segregability of factual and deliberative portions of the redacted and withheld documents. Schnader asserts that a segregability analysis of the 12 documents that were withheld in their entirety would not constitute an "inordinate burden" for the agency. *Lead Industries Ass'n v. Occup. S. and H. Admin*, 610 F.2d 70, 86 (2d Cir. 1979) (stating that an agency may only withhold an entire document when the non-exempt information "is so interspersed with exempt material that separation by the agency, and policing of this by the courts, would impose an inordinate burden"). In summary, Schnader contends that if Exemption 5 applies, DOE has failed to (1) adequately describe the redactions and the withheld documents, (2) make the requisite showing as to why there are no segregable portions of the material, and (3) consider the public interest in the documents. Schnader therefore asks OHA to order the release of the withheld information.

[1] "When emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with [CEQ] about *alternative arrangements*." 40 C.F.R. §1506.11 (emphasis added).
[2] The offices that were previously a part of DOE/EH are now contained in the Office of Health, Safety, and Security (DOE/HSS), which was officially established on August 30, 2006.
[3] Even though CEQ stated that it sent 19 documents to DOE for review, DOE made reference to 20 responsive documents in its determination letter.
[4] The Emergency Order was issued on December 20, 2005.

II. Analysis

A. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

(1) Applicability of Exemption 5

Schnader argues that because some of the documents were created after December 20, 2005, when the Executive Order was issued, those documents are "post-decisional" and Exemption 5 does not apply. Appeal at 1-2. Schnader states that communications made after the decision and designed to explain it are not privileged. "The exemption is to be applied as narrowly as consistent with efficient government operation." *Id.* at 2.

We must look to the purpose of Exemption 5 for a response to Schnader's argument. Exemption 5 protects documents that would reveal the decision-making process that results in a final agency decision. Thus, we focus our analysis on the effect that release of the responsive material would have on the process of arriving at an agency final decision. *Schell v. HHS*, 843 F.2d 933, 940 (6th Cir. 1988) (stating that in an Exemption 5 case, courts now focus less on the material sought and more on the effect of the release of the material). The ultimate issue in evaluating any deliberative process privilege claim is "whether the materials bear on the formulation or exercise of agency policy-oriented judgment." *City of Virginia Beach, Va. v. Department of Commerce*, 995 F.2d 1247,1254 (4th Cir. 1993).

This office has conducted a *de novo* review of the documents at issue, and we conclude that the records contain material that is clearly pre-decisional and deliberative. The responsive material contains copies of electronic mail messages between agency employees working to craft a document intended for publication in the Federal Register, drafts of the Federal Register notice that documented DOE's response to the emergency, and drafts of letters that document meetings between DOE and CEQ about the DOE response to the emergency. Release would clearly reveal the thought process that the DOE employees used to arrive at the order and the Federal Register Notice. The employees are using the emergency order as a guide or reference to arrive at a new policy document. Our review of the material shows that a member of the public who reads these documents in chronological order could easily ascertain how DOE employees arrived at the emergency order and

the final notice in the Federal Register.[5] Thus, release of this information could have a chilling effect on employees who are tasked to create a response to an environmental emergency in the future. Even though the emergency order is a final agency decision and many of the documents in question were created after it was issued on December 20, 2005, the documents are deliberative in content and subject to the protection of Exemption 5 because they were used in the preparation of the Federal Register Notice, which was not published until January 2006.

In summary, we find that DOE properly applied the protection of Exemption 5 to the responsive material. The documents in question are communications between employees who contributed to the agency response to the emergency situation at PRGS. The material is not intended to explain the order, but instead documents the discussions and analysis that transpired during the creation of the policy. Therefore, based on the content of the documents, we find that the material is deliberative and exempt from disclosure under Exemption 5.

(2) Description of Withheld Material

Schnader contends that DOE did not adequately describe the material that was withheld from release. In the Determination, 12 documents were withheld in their entirety and 10 were listed in an attachment, all described in a similar fashion:

9. CEQ 3 – Information withheld in its entirety under Exemption 5. 4 pages. (F2006-00189).

Determination at 3. [6]

We agree with Schnader that this is an insufficient description. There is no way that either the requester or the appellate authority can derive from this index a clear explanation of why each document was withheld. We have found in the past that in general a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available , the date on which the document was produced, its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Engineering*, 28 DOE ¶ 80,116 at 80,543 (2000). *See also Dorsett v. Department of the Treasury*, 307 F. Supp. 2d 28, 34 (D.D.C. 2004) (describing adequate *Vaughn* index).

B. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). DOE/HQ withheld 12 documents in their entirety but did not address the issue of segregability in the determination. This office reviewed all of the material that was withheld

[5] The Notice of Emergency Action was published in the Federal Register on January 20, 2006. *See* 71 FR 3279 (2006).
[6] Documents CEQ6 and CEQ19 were not on the list and no explanation was given for their omission.

in its entirety, and based on our review, we find that DOE/HSS should reconsider the issue of segregability in several of the documents withheld under Exemption 5. Our review concluded that the documents contain some factual, segregable material that could be released to the requester without revealing the deliberative process. *See Radioactive Waste Management Associates,* 28 DOE at 80,620. For example, CEQ 3 contains some factual and segregable information in the "Summary" and the "Procedural Background," CEQ 18 has some material that appears to be factual, and CEQ 37 may contain some factual information in the "Summary" and "Supplemental Information" sections. Our review found other documents that appear to contain non-exempt material. Non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). We agree with Schnader that "a segregability analysis of 12 documents does not constitute an inordinate burden to the agency." Appeal at 3. Thus, even though there is a minimal amount of non-exempt material, only 12 documents are involved and segregation of that material should not pose an undue burden for DOE/HSS. Accordingly, this portion of the Appeal is remanded to DOE/HSS.

C. Public Interest

The fact that the material requested falls within a statutory exemption does not preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the withheld information is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. *See L. Daniel Glass*, 29 DOE ¶ 80,271 (2006).

It Is Therefore Ordered That:

(1) The Appeal filed by City of Alexandria on July 25, 2006, OHA Case No. TFA-0171, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Health, Safety and Security of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review) pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the

district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 13, 2006